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No. 522

In the

# Supreme Court of the United States

OCTOBER TERM, 1963

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et al*,
*Petitioners,*

*v.*

AAXICO AIRLINES, INC.,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CHARLES J. MORRIS
1601 National Bankers Life Building
Dallas, Texas 75201

HENRY WEISS
50 East 42nd Street
New York, New York

MAURY MAVERICK, JR
906 Maverick Building
San Antonio, Texas

*Attorneys for Petitioners*

REILLY PUBLISHING COMPANY — 1710 S. HARWOOD — DALLAS, TEXAS — HA 8-8385

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Air Line Pilots Association, International, by its president and 90 individual petitioners,[1] represent-

[1] Richard Witkowski, M. K. Sidman, J. W. Haralson, Irwin F. Klumb, John T. Laney, Luther J. Smith, Jr., Bill M. Burke, W. D. Grainger, Nyle A. Chandler, Frank H. Sobey, R. R. Hickerson, Stanley A. Karpowicz, Samuel E. Terry, C. V. Mitchell, John R. Rodgers, E. D. Cowan, D. T. Wilson, O. T. Thorson, Thomas P. Leigh, B. B. Thomas, C. E. Anderson, S. T. Gillmor, Virgil A. Kinnison, Arthur R. Boden, John K. Riley, Guido V. Bevoni, Otis B. Ferrell, M. R. Robertson, Tom R. Callahan, Brandon F. Jones, Kenneth W. Wolff, Albert L. Majure, Bruce E. Schultz, Joseph C. Cheney, A. R. Liebeler, Otis E. Allison, Gates A. Roberts, R. A. Decha, Charles E. Hagan, Phil Steen, W. A. Fowler, Raymond L. Craig, Kenneth W. Camp, Charles M. Rowe, A. G. Young, Ernest J. Anderson, Charles F. Jackson, W. L. Adams, R. W. Tschirhart, R. A. Allen, Maurice Steen, L. H. Winans, D. Barner, Arthur E. Fehr, Gary A. Denzer, James D. McClure, George N. Olsen, S. L. Ballif, Geo. J. Vizard, John H. Wood, LeRoy F. Lovegrove, Jr., George L. Budde, Paul O. West, Duncan J. Cameron, G. H. Edde, C. S. Jarnagin, Charles G. Herrick, R. E. Conrad, R. A. Juengermann, E. N. Simmons, Charles M. Daly, James E. Taylor, Kenneth W. Myers, O. L. Howell, A. E. Chappell, Alvin A. Knox, Harold K. Snyder, Stephen L. Szabolscky, Dennis S. Matthews, John G. Gray, David W. Mathews, S. S. Osborne, Don V. Deming, John E. Dayhuff, James N. Collins, J. L. Lovvorn, D. H. Guinn, O. Y. Goswick, Milton M. Clark, James V. Allred.

ing a class of 221 pilots, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on April 15, 1964. Their timely Petition for Rehearing In Banc was overruled on July 10, 1964.

## Opinion Below

The opinion of the Court of Appeals is printed in Appendix B hereto, *infra* pp. 9a-21a. It is reported at 331 F. 2d 433, 55 LRRM 2982, and 49 LC ¶18,886.

## Jurisdiction

The judgment of the Court of Appeals was entered on April 15, 1964 (R. 829). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## Questions Presented

1. Does a federal court have jurisdiction under the Railway Labor Act to issue an injunction requiring an air carrier to maintain the terms and conditions of employment and rates of pay embodied in a current collective bargaining agreement, pending exhaustion of Section 6 procedures?

2. Does a federal court have jurisdiction under the Railway Labor Act to determine whether a collective bargaining agreement has been terminated?

3. In a case involving both violations of the Railway Labor Act and breach of a collective bargaining agreement, does a federal court have jurisdic-

tion to remedy the statutory violations by enjoining an air carrier (1) from making unilateral changes in rates of pay, rules and working conditions, (2) from refusing to recognize and bargain with the certified representative of the class or craft, (3) by requiring the carrier to give effect to all provisions of the agreement, and (4) by requiring the carrier to join in establishing a system board of adjustment to function under said agreement?

4. Does a federal court have jurisdiction under the Railway Labor Act to *construe* a collective bargaining agreement to the extent necessary to determine whether a carrier's unilateral changes have created a major dispute because they constituted changes in rates of pay, rules, or working conditions of employees as a class and were not governed by the terms of the agreement?

5. Assuming the prior termination of a collective bargaining agreement, does the Railway Labor Act require adherence to the provisions of said agreement pending exhaustion of Section 6 procedures, and does a federal court have jurisdiction to issue an injunction to this effect?

6. Assuming exclusive jurisdiction of a system board of adjustment to decide claims under a collective bargaining agreement, does a federal court have jurisdiction to issue an injunction to restore and maintain the status quo pending resolution of such claims by the board of adjustment?

7. May an air carrier avoid its obligations un-

der the Railway Labor Act by the device of contracting with a pilot supply company for all its pilots, whereby said pilots are carried on the payroll of the supply company but fly regularly and exclusively for and under the direction and control of the carrier?

## Statute Involved

The statute involved and referred to herein is the Railway Labor Act (44 Stat. L. 577, 48 Stat. 1185, 49 Stat. 1189, 45 U.S.C. §§151, *et seq.*), pertinent provisions of which are set out verbatim in Appendix A hereto, pp. 1a-8a.

## Statement

The facts of this case are not in dispute. This was evidenced by the District Court's entry of summary judgment on stipulated and admitted facts and the acceptance of the District Court's findings of fact [R. 678-690] by the Court of Appeals, although the Court of Appeals failed to note certain material facts included in the following statement.

"Aaxico had for several years conducted an air transportation business with the use of C-46 aircraft on the basis of contracts with the United States Government. Beginning on June 16, 1956, Aaxico and ALPA had been parties to a collective bargaining agreement covering the employees flying its

aircraft.[2] The most recent of the collective bargaining agreements between the parties became effective on January 1, 1960. It provided that it was to continue in full force and effect until June 30, 1961, 'and thereafter until each succeeding June 30, unless written notice of intended change is served in accordance with Section 6, Title 1 of the Railway Labor Act by either party thereto at least 60 days prior to June 30, 1961, or June 30 of any succeeding year.' Prior to the expiration date of the last agreement . . . on the occasion of Aaxico's losing its Logair (Government) contract as of June 30, 1960 . . . Aaxico furloughed all of its approximately 221 pilot employees by giving them two weeks' notice as required under the agreement. The notice contained the statement, 'We cannot, at this time, see any possibility of a resumption of our Logair flying but if any change should take place you will be promptly notified.'

"Thereafter, although Aaxico had no other air transportation business to carry on until it was able to obtain further or new contracts, it did not dissolve but maintained a skeleton organization principally engaged in seeking new contracts including an effort to bid on the following year's Logair contract."[3]

On October 17, 1960, Aaxico's president, Howard Korth, wrote ALPA stating that "Aaxico Airlines has suspended service . . . [T]he subject

[2] ALPA had been certified by the National Mediation Board as the representative of the class or craft of airline pilots in the service of Aaxico.

[3] Opinion, pp. 10a-11a, *infra*.

matter of the agreements . . . no longer exists and therefore Aaxico Airlines considers these agreements terminated and of no further legal force and effect." [R. 48] ALPA's president, Clarence N. Sayen, replied by letter of November 8:

> ". . . So long as AAXICO remains inoperative, this document lies dormant. In the event that operations of the Company are resumed, however, within the period in which AAXICO pilot employees have job tenure[4] under this Agreement, this Association would require their reemployment by the Company. Additionally, even though reactivation of operations by AAXICO occurs at some future date after present pilot employees have lost their tenure of employment under the Employment Agreement now in effect, ALPA is still the certified bargaining agent of the class and craft of pilot employees of AAXICO, and as such, would expect the Company to deal with the Association accordingly." [R. 49-50]

Korth did not challenge Sayen's interpretation of the agreement or his statement of Aaxico's continuing obligation to treat with ALPA as the certified representative of Aaxico's pilots. Indeed, Aaxico made no reply whatever. The Court of Appeals, however, with benefit of hindsight, comments that ". . . if the question of the termination of the contract had been resolved in the fall of 1960 at a time when no pilots were employed or sought to be employed by Aaxico, this whole dispute might well have been resolved before the commencement

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[4] Four years under the agreement [R. 37, Section 24A].

of the operations by the use of new equipment July 1, 1961." But during the fall of 1960 Aaxico was not operating and there was nothing of substance to dispute about. In June and July of 1961, however, a serious dispute developed.

In the spring of 1961 Aaxico began preparing for a bid on a new government contract. And by the time it filed its formal bid on May 19, 1961, it had already agreed to obtain flight crews from one Barry Paul Vaughn, operating as the Aerial Service Corporation (ASCO) [R. 683], but it had made no effort to contact either ALPA or the furloughed employees. [R. 173, 680-681]. Aaxico was awarded the government contract on June 2, 1961, with final approval granted after operations began on July 1, 1961. This and other contracts have since been renewed with some modifications [R. 683-684].

The new flight operations, which began on July 1, 1961, called for use of DC-6 aircraft. The collective bargaining agreement contained pay scales for DC-6 operations and provided for recall and qualifying of pilots [R. 37, pp. 4 *et seq.*, pp. 19-24], and also provided that vacancies would be "posted . . . as far in advance as practical but in no case later than thirty (30) days after the vacancy exists or it is determined that a vacancy will exist." [R. 37, p. 20]. Aaxico ignored these and other provisions of the agreement and instead entered into a written contract with Vaughn's pilot supply company (ASCO) and with a California company called IASCO in June, 1961, under which ASCO and IASCO agreed, for a percentage of payroll surcharge, to refer

flight personnel who would remain on the pilot supply company payroll but who, on acceptance by Aaxico, would operate the aircraft under the direction and supervision of Aaxico.[5] [R. 684-689]. It has been respondent's position throughout this litigation [R. 603] that such pilots are not its employess; however, the District Court found that they were employees of Aaxico [R. 690-691], and the Court of Appeals agreed that "we can assume [the pilot supply companies] amounted to nothing more or less than a service agent for the employment of pilots by the Airline itself."

Since June, 1961, Aaxico has made no effort to apply the union agreement [R. 604-605], nor has it complied with any of the notice or bargaining requirements of the Railway Labor Act, although it has changed wages and working conditions of its pilots numerous times [R. 139, 173, 208-212, 252-255, 321, 688, 780-783].

It was stipulated that the first notice which Aaxico gave its furloughed pilots that flight operations had resumed was a letter dated July 18, 1961, [R. 681] which letter, however, did not offer recall or bid rights. Two days later ALPA filed a group grievance protesting respondent's violation of the agreement, specifically including the refusal to recall furloughed pilots. Aaxico refused to consider the grievance, whereupon ALPA filed an appeal, to which Aaxico made no reply [R. 685]. Aaxico's president testified that he was not willing to settle

[5] During the pendency of this appeal Aaxico resumed some C-46 operations and later converted back to all DC-6 operations. During the latter changeover Aaxico provided training to qualify C-46 pilots for DC-6 operations.

this dispute through the grievance procedure of the contract, including a system board of adjustment; he testified that a system board no longer existed [R. 182].[6]

Petitioners filed this action for declaratory judgment, injunctive relief, and damages[7] in the United States District Court on August 8, 1961. Respondent filed four motions to dismiss, none of which raised a jurisdictional question regarding alleged failure of petitioners to obtain a system board determination of the dispute.[8] [R. 55, 67, 77, 513]. The principal issue in the trial court concerned Aaxico's continued denial that it was subject to the provisions of the Railway Labor Act [R. 596]. The District Court found that its operations were covered by said Act, and respondent did not appeal from that ruling. Aaxico also contended that its letter of October 17, 1960, constituted a termination of the agreement, although the agreement made no provision for termination, it being subject to the requirements of the Railway Labor Act for changing rates of pay, rules, and working conditions. The

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[6] The non-existence of a system board of adjustment was also noted by the District Court: the court's injunction specifically ordered Aaxico to join with ALPA "in establishing a system board of adjustment" [R. 649], from which portion of the order Aaxico did not appeal.

[7] The court did not award damages directly, holding instead that the system board of adjustment, which it ordered established, has jurisdiction of the pilots' claims for loss of earnings [R. 646].

[8] All four motions were overruled, and no appeal was taken as to the issues raised therein. Aaxico did not assert the defense of primary jurisdiction of the system board of adjustment until a full year after the case was filed, at which time petitioners invited submission of the dispute to a system board, which respondent refused. [R. 805]

trial court concluded, on undisputed facts, that Aaxico "failed to give proper notice under the collective bargaining agreement and the Railway Labor Act to change the terms and conditions of the plaintiff pilots' employment," and "[s]ince the defendant failed to modify the collective bargaining agreement in accordance with either Section 3, paragraph 4, or Section 32 thereof, said agreement automatically renewed itself and is presently in effect." [R. 690]*

In addition to resolving that issue, the trial court found that Aaxico had violated the status quo provisions of the Act, that it had refused to treat and bargain with the certified representative of its pilot employees, that it had engaged in individual bargaining with its employees, and that it had recognized and bargained with persons (ASCO and IASCO) who were not certified representatives of the employees. [R. 688-689]. The District Court then fashioned an appropriate remedy which recognized the delicate balance to be maintained between the jurisdiction of the court and the jurisdiction of the system board. It issued an injunction which required Aaxico (1) to treat with ALPA, (2) to cease bargaining or treating with non-certi-

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*Among other defects in the notice, Aaxico failed to arrange a conference within ten days or to hold such a conference within 30 days, as required by the contract and Section 6 of the Act. Furthermore, the sole reason which Aaxico advanced for "considering" the agreement terminated was that its operations had terminated. But, as found by both the District Court and the Court of Appeals, the company "did not dissolve" and by June, 1960, the reason had ceased to exist—it had a new government contract and it has operated continuously ever since.

fied representatives, (3) to restore the wages and conditions which prevailed before the unilateral changes were made, (4) to refrain from making any future changes except in accordance with requirements of Section 6 of the Act, and (5) to join with ALPA in establishing a system board of adjustment. The order went no further than was necessary to restore the status quo, require recognition of the certified representative, and reassert the validity of the agreement. Although the injunction required Aaxico to comply with the agreement, the order to comply was general in nature—any disputes regarding compliance were left to the parties and to the system board. The court's order thus recognized that the real issue was never whether the unilateral changes violated the collective bargaining agreement, for Aaxico had admitted in its answer that its pilots "are not being paid in accordance with the collective bargaining contract with ALPA" and "that it does not consider itself bound by the provisions of the ALPA contract. . . ." [R. 604, 606].

The Court of Appeals, however, notwithstanding petitioners' efforts to obtain clarification by rehearing, ignored those portions of the District Court's order, with corresponding remedy, which related to violations of the Railway Labor Act and dealt with (1) the duty of a carrier to "treat with" the certified representative of the employees "for the purposes of this Act," i.e., for settlement of disputes and for collective barging [§2, ninth], (2) the duty of the carrier "to make and maintain agreements concern-

ing rates of pay, rules, and working conditions [§2, first], and (3) the requirement that [no] carrier . . . shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act." [§2, seventh].

The Court of Appeals viewed the question of termination of the collective bargaining agreement as central to the case, and held that this question

> "could be decided only by interpreting the agreement itself and thus it was a minor dispute, one which under the completely uniform holdings of the courts[10] must be submitted to the grievance procedures with final decision to be made by the System Board of Adjustment. We conclude, therefore, that it was beyond the competence of the trial court to resolve this dispute."

**Reasons for Granting Writ**

1. The decision of the Court of Appeals refusing to allow an injunction to protect the status quo where a carrier is making unilateral changes in rates of pay, rules, or working conditions conflicts with the decision of the Court of Appeals for the District of Columbia Circuit in *Southern Railway Co. v. Brotherhood of Locomotive Firemen and Enginemen*, —— F. 2d ——, 56 LRRM 2742, 50 L.C. ¶19,119, decided July 14, 1964, in which that court

[10] No cases were cited.

held, notwithstanding the limited necessity of *construing* the contract, that

> "With respect to this 'claim' (count) of the complaint, we think that the District Court was clearly correct in enjoining any effort by Southern to effectuate a change in the working practice under its contract, prior to 1960, of operating all locomotives with a fireman present in the cab pending a modification or change of that contract in accordance with the Act. And further in this particular we are equally clear that the injunction under this 'claim' must forbid also a change in the long-standing interpretation in this respect which had been given by the parties to the existing contract. To allow a change in the construction of the contract in the way sought here would in substance and effect change the contract itself, as acted upon and applied by the parties from the beginning. As the District Court said, to permit this would subvert the purpose and intent of Section 6 of the Act."[11]

2. The decision below that the question concerning termination of the collective bargaining agreement "could be decided only by interpreting the agreement itself and thus was a minor dispute," announces a proposition of law which is contrary to the language of Section 6 and which directly conflicts with the decision of the Court of Appeals

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[11] The Court's attention is also directed to the Fifth Circuit decision in *Railroad Yardmaster v. St. Louis, San Francisco & Texas Ry. Co.*, 328 F. 2d 749, certiorari denied June 15, 1964, ____ U.S. ____, 12 L.ed2d 748, 84 S.Ct. 1886, which was cited by the Court of Appeals in the instant case. It too conflicts with the decision of the D. C. Circuit in the *Southern Ry.* case.

for the Second Circuit in *Manning v. American Airlines,* 329 F.2d 32, in which petition for certiorari was filed on May 13, 1964, and which is now pending (October Term, 1963, No. 79). The petition for certiorari therein expressly recognized and relied on this conflict (pp. 7-8).

Neither the agreement in the instant case nor Section 6 provided for termination of the agreement, and, under established interpretation of the Act, as noted in *Manning v. American Airlines,*

> "The effect of §6 is to prolong agreements subject to its provisions regardless of what they say as to termination. . . . [T]he very purpose of §6 is to stabilize relations by artificially extending the lives of agreements for a limited period regardless of the parties' intention." 329 F.2d 32, 34.

Implicit in the opinion below is the erroneous premise that if the contract did in fact terminate, the rights and responsibilities of the parties thereunder also terminated. But the scheme of the Railway Labor Act does not permit a contractual hiatus — at least not until after elaborate bargaining and mediation procedures have first been exhausted. The parties recognized this in Section 32 of their agreement, which omitted provision for termination as such but provided for contract changes when notice was "served in accordance with Section 6, Title I of the Railway Labor Act. . . ." The trial court thus made its determination on the basis of Section 6 of the statute, not-

withstanding that such section was incorporated by reference in the parties' agreement.

At the very least, it should have been a moot question whether or not the agreement was terminated, for even assuming termination, the terms and conditions of employment and rates of pay embodied in the agreement should have been maintained pending exhaustion of Section 6 procedures designed to effect the changes. After June, 1961, however, Aaxico made no pretence of following any Railway Labor Act procedures.

Another reason under this point is found in the inconsistent language appearing at the end of Judge Tuttle's opinion. He commented that if the parties had raised a grievance in the fall of 1960 "this whole dispute might well have been resolved . . .," but he also recognized that petitioners might have had to seek judicial assistance if "they were unable to pursue their grievance procedures because of the failures on the part of the appellant to make such processes available." Yet curiously he gave the District Court a choice in the fall of 1960 which he inexplicably[12] denied the same court in the summer of 1961. His dicta read as follows:

> "Thereupon *the trial court* could promptly have resolved this issue *either* by directing submission of the questions to the grievance procedures *or by holding that the appellees no longer had such rights.*" (Emphasis added).

[12] The only cited authority was reference to "completely uniform holdings," none of which were identified by the Court.

But the District Court could hold that the appellees "no longer had such rights" only if the *court* "interpreted" the contract and found that Korth's letter of October 17 was an effective termination of the agreement. By the same reasoning, the same option should have been available to the trial court after the grievance was filed on July 20, 1961.

Furthermore, in ruling that the agreement had not been terminated, the trial court was but determining the *validity* of the underlying agreement — a function of the court and not of the adjustment board. *Railroad Yardmasters v. Pennsylvania Railroad Co.*, 224 F. 2d 226 (C.A. 3, 1955); *Railway Conductors v. Switchmen's Union*, 269 F. 2d 726 (C.A. 5, 1959); *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768, 96 L. ed. 1283, 72 S. Ct. 1022 (1952); *Switchmen's Union of North America v. Ogden Union Ry. & Depot Co.*, 209 F.2d 419 (C.A. 10, 1954), cert. den. 347 U.S. 989.

The Fifth Circuit view herein that determining the underlying existence or validity of the collective bargaining contract is a function to be performed exclusively by the adjustment board is also contrary to the reasoning and the holdings of this Court in parallel cases involving arbitration under Section 301(a) of the Labor Management Relations Act. [29 U.S.C. §185(a)] *Wiley & Sons v. Livingston*, 376 U.S. 543, 11 L. ed. 2d 898, 902, 84 S. Ct. — (1964). Cf. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 4 L. ed. 2d 1409,

80 S. Ct. 1347; *Atkinson v. Sinclair*, 370 U.S. 238, 241, 8 L. ed 2d 462, 82 S. Ct. 1318.

3. The decision below denies to the federal courts their traditional equity jurisdiction to enjoin carriers from violating the bargaining and status quo provisions of the Railway Labor Act. *Virginia Railway Co. v. System Federation*, 300 U.S. 515, 57 S.Ct. 515, 57 S.Ct. 592, 81 L.ed. 789; *Burke v. Morphy*, 109 F.2d 572 (C.A. 2, 1940); *Rolfes v. Dwellingham*, 198 F.2d 591 (C.A. 8, 1952); *Telegraphers v. Railway Express Co.*, 32 U.S. 342, 88 L. ed. 788, 64 S.Ct. 582; *Railroad Yardmasters v. Pennsylvania Railroad, supra; Railway Clerks v. Atlantic Coast Line*, 201 F.2d 36 (C.A. 4, 1952), cert. den. 345 U.S. 992, 73 S.Ct. 1131; *Akron C. & Y. R. Co. v. Barnes*, 215 F.2d 423 (C.A. 7, 1954); *Manning v. American Airlines, supra; Southern Railway Co. v. Locomotive Firemen and Enginemen, supra.*

Even if the system board of adjustment had been in existence with appropriate jurisdiction, it would have had neither the means nor the authority to restore and maintain the status quo by injunctive process. Only the District Court could protect the parties pending final determination by the adjustment board. And certainly the adjustment board had no jurisdiction to find or to remedy violations of statutory duties. *Texas & N. O. R. Co. v. Railway Clerks*, 281 U.S. 548, 50 S.Ct. 427; *Rumbaugh v. Winifrede R.R. Co.*, 331 F.2d 530 (C.A. 4, 1964), cert. filed July 15, 1964 (October Term, 1963, No. 282).

4. The Court of Appeals erroneously held that the extent of petitioners' rights after the exchange of correspondence in the fall of 1960 "was to present their contention to the district court that they were unable to pursue their grievance procedures because of stated failures on the part of the appellant to make such process available." But such facts (undisputed) had already been presented to the trial court and indicated a refusal by Aaxico to process the grievance. In any event, therefore, petitioners were entitled to an injunction maintaining the status quo pending resolution of their claims by the system board of adjustment. The injunction accomplished this end, and was in accord with the holding in *Missouri-Kansas-Texas R.R. Co. v. Locomotive Engineers,* 363 U.S. 528, 4 L. ed. 2d 1379, 80 S.Ct. 1326, which affirmed the issuance of an injunction against a strike over a minor dispute containing conditions requiring maintenance of the status quo pending resolution of the dispute by the board of adjustment. The exact question now posed (Question 6, herein) is the question which this Court expressly reserved in footnote 3 of the *M.K.T.* case:

> "We did not decide in Chicago River, and we do not decide here, whether a federal court can, during the pendency of a dispute before the Board, enjoin a carrier from effectuating the changes which gave rise to and constitute the subject matter of the dispute, independently of any suit by the railroad for equitable relief." 363 U.S. 528, 531.

5. The Court of Appeals accepted the trial court's findings and conclusions that the pilots supplied by ASCO and IASCO were employees of Aaxico. Nevertheless, the device of contracting for alleged non-employee pilots represents a subterfuge which should be reviewed in order to preserve the integrity of the provisions of the Railway Labor Act guaranteeing representation and bargaining to a carrier's employees.

## Conclusion

For the above reasons, petitioners pray that a writ of certiorari be granted.

Respectfully submitted,

CHARLES J. MORRIS
1601 National Bankers Life Building
Dallas, Texas 75201

HENRY WEISS
50 East 42nd Street
New York, New York

MAURY MAVERICK, JR.
906 Maverick Building
San Antonio, Texas

*Attorneys for Petitioners*

September 22, 1964

# APPENDICES

# APPENDIX A

## Statutory Provisions

The relevant provisions of the Railway Labor Act (44 Stat. L. 577, 48 Stat. 1185, 49 Stat. 1189, 45 U.S.C. §§151, *et seq.*) are as follows:

## TITLE I

* * *

Sec. 2. GENERAL PURPOSES — The purposes of the Act are:

(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

### GENERAL DUTIES

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements

concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to

determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, . . .

* * *

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further,* That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified

as the representative of the craft or class for the purposes of this Act. . . .

* * *

Sec. 3. First. There is hereby established a Board, to be known as the "National Railroad Adjustment Board," the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided —

* * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * *

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding dis-

putes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

* * *

Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

* * *

## TITLE II

Section 201. All of the provisions of Title I of this Act, except the provisions of section 3 thereof,

are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

Sec. 202. The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of Title I of this Act, except section 3 thereof, shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee," respectively, in section 1 thereof.

* * *

Sec. 204. The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board,

as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 3, Title I, of this Act.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group or carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this Act shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

* * *

## APPENDIX B

**Opinion**

**IN THE**

# United States Court of Appeals

**FOR THE FIFTH CIRCUIT**

**No. 20931**

AAXICO AIRLINES, INC.,

*Appellant,*

*versus*

AIR LINES PILOTS ASSOCIATION, INTERNATIONAL, ET AL.,

*Appellees.*

*Appeal from the United States District Court for the Western District of Texas.*

(April 15, 1964.)

Before TUTTLE, Chief Judge, and RIVES and WISDOM, Circuit Judges.

TUTTLE, Chief Judge: This appeal raises the question whether the trial court had jurisdiction to construe what it found to be a subsisting agreement and to grant an injunction requiring the appellant to carry out the terms of such agreement as construed by the trial court.

The contest between the parties arose in the following manner:

Aaxico had for several years conducted an air transportation business with the use of C-46 aircraft on the basis of contracts with the United States Government. Beginning on June 16, 1956, Aaxico and ALPA had been parties to a collective bargaining agreement covering the employees flying its aircraft. The most recent of the collective bargaining agreements between the parties became effective on January 1, 1960. It provided that it was to continue in full force and effect until June 30, 1961, "and thereafter until each succeeding June 30, unless written notice of intended change is served in accordance with Section 6, Title 1 of the Railway Labor Act by either party thereto at least 60 days prior to June 30, 1961, or June 30 of any succeeding year."[1] Prior to the expiration date of this last agreement, and without any specific written notice "of an intended change in agreements affecting rates of pay, rules or working conditions," on the occasion of Aaxico's losing its Logair (Government) contract as of June 30, 1960, and the leasing by it of approximately 25 C-46 aircraft to Capitol Airways, which company acquired the Logair contract from the Government, Aaxico furloughed all of its approximately 221 pilot employees by giving them two weeks' notice as required under the agreement. The notice contained the statement, "We cannot, at this time, see any possibility of a resumption of our Logair flying but if any change should take place you will be promptly notified."

[1] Section 6, Title 1 of the Railway Labor Act is a provision relating to the change "in agreements affecting rates of pay, rules or working conditions," and provides for the processing of bargaining through the Mediation Board before proposed changes in such existing agreements can be put into effect.

Thereafter, although Aaxico had no other air transportation business to carry on until it was able to obtain further or new contracts, it did not dissolve but maintained a skeleton organization principally engaged in seeking new contracts including an effort to bid on the following year's Log-air contract.

On October 17, 1960, during the stated life of the contract, Aaxico wrote to ALPA as follows:

> "Aaxico Airlines has suspended service in all forms of air transportation. We operated our last flights in early July of 1960 and have not had any pilots in our employ since that date.
>
> "On December 7, 1959, an Agreement and various Letters of Agreement and a Supplemental Agreement were signed between Aaxico Airline, Inc., and The Air Line Pilots in the service of Aaxico Airline, Inc., as represented by The Air Line Pilots Association International.
>
> "This letter is to advise that the subject matter of the agreements listed in the Paragraph above no longer exists and therefore Aaxico Airlines considers these agreements terminated and of no further legal force and effect."

Appellee replied on November 8, in part, as follows:

> "We are not in a position to agree entirely with your statement. So long as AAXICO remains inoperative, this document lies dormant. In the event that operations of the Company

are resumed, however, within the period in which AAXICO pilot employees have job tenure under this Agreement, this Association would require their reemployment by the Company."

This letter from Aaxico and the reply by ALPA had clearly created the first dispute between the parties. If this dispute was referable to a construction of the terms of the then existing contract, the procedure required by the Railway Labor Act was that the aggrieved party should have then filed a grievance and processed it through the System Board of Adjustment. If, on the other hand, this amounted to the thirty days' written notice contemplated by Section 6 of Title 1 of the Railway Labor Act of "an intended change in agreements affecting rates of pay, rules or working conditions," the parties were under obligation to arrange for the conference provided for in Section 6 of Title 1 and proceed through the Mediation Board until the negotiations for the new contract, or the change in the old contract, were exhausted.

Neither of these procedures was followed. Instead, after Aaxico obtained new Government contracts, effective July 1, 1961, in the performance of which it used DC-6A aircraft, a type of aircraft different from that which had theretofore been used in the prior operation and as to which pilot qualifications are different and more stringent, the Airline proceeded to obtain pilots through two pilot supply companies which, for the purpose of this appeal, we can assume amounted to nothing more or less than

a service agent for the employment of pilots by the Airline itself. However, prior to the actual commencement of operation, on June 28, 1961, appellee, without having made any further demand or request for arbitration or mediation under either provision of the Railway Labor Act, brought suit in the Florida State Courts against the appellant seeking a construction of the contract, a declaration of the rights, and enforcement of the contract.[2]

The next step chronologically was that on July 20, 1961, after appellant had begun DC-6A operations, appellee addressed a letter containing the following to the President of Aaxico:

> "Pursuant to the Agreement between Aaxico Airlines, Incorporated and the air line pilots in its service, as represented by the Air Lines Pilots Association, International, the pilots of Aaxico Airlines, Inc., hereby file this as a Group Grievance and request an investigation and hearing thereon. The grievance is based upon the Company's violation of the Agreement, specifically including Sections 13 and 24 thereof, by refusing to recall furloughed pilots."

Section 13 of the contract provides for seniority. Section 24 provides for the demotions and reduction of personnel.

The President of the appellant replied on July 27th as follows:

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2 This suit was subsequently dismissed, but not until after this present action was brought in the federal court and appellant moved to stay this action pending a decision of the Florida State Court.

"As Airline Pilots Association International was advised on October 17, 1960, Aaxico Airlines considers that the agreement previously existing between Aaxico Airlines and the airline pilots in the service of Aaxico has been terminated. This company, therefore, could not possibly be in violation of such terminated agreement and your request for a hearing based upon an alleged group grievance is entirely out of line and, of course, cannot be considered by this company."

To this letter appellee replied on August 4th:

"I am in receipt of your letter of July 27, 1961, denying my request for a hearing relative to a group grievance dated July 20, 1961. Since this decision is unsatisfactory to the affected pilots, I hereby request an appeal hearing.

"It is requested that the Company send a copy of all hearing notices and decisions rendered in this case to the undersigned and to the Legal Department, Air Line Pilots Association,

International, 55th Street and Cicero Avenue, Chicago 38, Illinois."

No action thereafter having been taken by either party relating to the matter of grievance, ALPA filed this suit on August 24, 1961.

The pleadings and proof adduced before the trial court presented the following issues:

(1) Did the loss by Aaxico of its sole air carriage contract, followed by the leasing of its planes to another airline and the furloughing of all of its pilots, and the complete suspension of its operations pending the obtaining of a new contract, either constitute a termination of the collective bargaining agreement then in effect or did it warrant Aaxico in treating it as terminated by its unilateral action?

(2) What tribunal is appropriate under the National Railway Labor Act to decide issue No. 1?

(3) If the agreement between Aaxico and ALPA remained in effect through the date of expiration, June 30, 1961, notwithstanding the circumstances mentioned in issue No. 1, were any of the rights of ALPA and its members under such agreement violated upon the occasion of Aaxico's reengaging in air carriage under the contracts it obtained to be effective July 1, 1961?

(4) If such rights were violated, what tribunal should make these determinations?

(5) Did the district court have jurisdiction over this controversy and, if so, to what extent?

The trial court held that the first issue was to be answered in the negative. It decided on the basis of the facts, which were undisputed so far as actually bear on *this* issue, that the loss of the Logair contract with the Government by Aaxico and its complete suspension of operations pending the negotia-

tion of a future contract, which occurred approximately one year later, neither amounted to a termination nor did it justify Aaxico in terminating it unilaterally.

Thus, the trial court also answered the second issue. It decided that it was the proper tribunal to pass on this legal question.

The trial court also answered issue No. 3 by stating that it had jurisdiction to determine that under the contract there were certain rights both of ALPA and of its members that were violated when Aaxico hired new pilots, and paid them different rates of pay than provided for under the agreement and when it hired the new pilots without reference to the seniority and other provisions of the existing agreement.

The court, thus, also decided issue No. 4, partially, to the effect that it was the proper tribunal to determine what rights under the contract had been violated, but it also decided that there were certain other contract disputes that should be referred, following grievance procedures as outlined in the agreement, to the System Board of Adjustment.

Finally, the court answered issue No. 5, both by the action it took in resolving issues Nos. 1 and 3, but also by concluding that it had the power to require Aaxico to assure the setting up of a System Board of Adjustment in order that grievance pro-

cedures could be pursued as provided for under the Railway Labor Act.

We conclude that the jurisdiction of the court was considerably more limited than that which it exercised. To the extent that the trial court could find on the record before it that the appellant had failed to make available the grievance machinery in order to permit a reference to a System Board of Adjustment, and to the extent that the court could find that ALPA had not either acquiesced in or abandoned any rights which it may have had under the contract, if not terminated, it would be within the competence of the trial court to have required Aaxico to assure the availability of grievance procedures and a System Board of Adjustment. In point of fact, Aaxico did not appeal from that part of the trial court's order which required it to "join with plaintiff Air Line Pilots Association in establishing a System Board of Adjustment to function under said contract; and give effect to such System Board, as set out in the System Board Agreement of said contract."

This is another one of those cases which, when brought to court, poses the preliminary question whether the relief sought is relief which can appropriately be granted by the court or which, under the carefully considered scheme of the Railway Labor Act, must be resolved by the System Board of Adjustment. The answer to this question is found in determining whether the dispute is what has generally been recognized in cases arising between car-

riers and their employees as a "minor" dispute or a "major" dispute. This terminology, used by the Supreme Court in *Elgin, Joliet & Eastern Rwy. Co. vs. Burley,* 325 U.S. 711, was discussed by us in a recently decided case, *St. Louis, San Francisco & Texas Rwy. Co. v. Railroad Yardmasters of America, AFL-CIO,* 5th Cir. . . . F.2d . . . , No. 20570, decided March 4, 1964. Pointing out, as we did, in that opinion that the court has adhered to the distinction between minor disputes and major disputes we there said, "It is plain here that the dispute raised by the complaint could be resolved only by construing the existing contract. It follows that the trial court erred in entertaining jurisdiction of the suit. The appellee should have been remanded to the grievance proedure set forth in the contract."

We thus recognized what has always been the distinction between the two types of disputes. If "the dispute relates either to the meaning or proper application of a particular provision [of an existing agreement] with reference to a specific situation or to an omitted case," *Elgin, Joliet & Eastern Rwy. Co. v. Burley,* 325 U.S. 711, it is a minor dispute no matter how seriously it may affect the parties to the contract.

With these general principles in mind we look first to the first issue stated above. Clearly, the complaint by which this litigation was started was based on the theory that the agreement between Aaxico and ALPA was a continuing one and was still in effect. The complaint showed that the appel-

lant had proceeded on the theory that the contract had been terminated. How, then, was this question to be decided? Obviously, it could be decided only by interpreting the agreement itself and thus it was a minor dispute, one which under the completely uniform holdings of the courts must be submitted to the grievance procedures with final decision to be made by the System Board of Adjustment. We conclude, therefore, that it was beyond the competence of the trial court to resolve this dispute.

So, too, with respect to the other interpretations made by the trial court of the obligations of the parties under the terms of the agreement. For instance, whether, assuming the contract was still in effect, Aaxico was required to recall for the operation of the new equipment requiring greater or different skills, the pilots who had previously been furloughed, was necessarily to be determined from the contract of employment. The failure of Aaxico to recall the pilots and, in their place, to accept pilots furnished by another agency, if objected to by ALPA or any of the plaintiffs, was the proper subject of grievance procedures in the traditional sense. Thus, it was beyond the competence of the trial court to resolve these issues as well, of course, as the issue of whether the pay requirements under the contract were to be carried out.

We think it clear that if the proof shows that Aaxico made impossible the carrying out by the appellees of the grievance procedures to the System

Board of Adjustment, the trial court had jurisdiction to order Aaxico to carry out its obligations under the contract to make arbitration and decision of these matters effective. *Virginia Rwy. Co. v. System Federation No. 40,* 300 U.S. 515.

The undisputed facts present in this case probably warrant a comment that, regardless of how the trial court finally determines the factual issues, a normal processing of the disputes immediately after they arose would have proved the efficacy of the plan contemplated in the Railway Labor Act, whereas the failure to resolve these disputes promptly has resulted in litigation that will inevitably lead to serious unanticipated loss to one party or the other. This is true because if the question of the termination of the contract had been resolved in the fall of 1960 at a time when no pilots were employed or sought to be employed by Aaxico, this whole dispute might well have been resolved before the commencement of the operations by the use of new equipmnt July 1, 1961. We do not intimate a judgment on the issue whether the circumstances existing after the exchange of correspondence at that time amounted to either an acquiescence by appellees or a waiver of a right to pursue the dispute further, but we do hold that the extent of the rights of the appellees thereafter was to present their contention to the district court that they were unable to pursue their grievance procedures because of stated failures on the part of the appellant to make such processes available. Thereupon the trial court could promptly have resolved this issue either by directing submission

of the questions to the grievance procedures or by holding that the appellees no longer had such rights.

The judgment is REVERSED and the case is REMANDED for further proceedings not inconsistent with this opinion.